No. 16,282

IN THE

United States Court of Appeals

For the Ninth Circuit

REXALL DRUG COMPANY, a corporation, and ARNOLD L. LEWIS, doing business as Studio Cosmetics Company,
Appellants,

vs.

SANDRA MAE NIHILL, etc.,
Appellee.

REPLY BRIEF OF APPELLEE SANDRA MAE NIHILL.

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REPLY BRIEF OF APPELLEE SANDRA MAE NIHILL.

Because the judgment herein is against two separate defendants under two separate and distinct theories and principles of liability, continuity of the brief of the appellee presents some difficulties. Therefore, even with the risk of repetition, appellee is treating the briefs of the two defendants separately, including the statement of the case.

THE DEFENDANT AND APPELLANT, ARNOLD L. LEWIS, DOING BUSINESS AS STUDIO COSMETICS COMPANY.

STATEMENT OF THE CASE.

Because appellee feels that the statement of the case of the appellants is in many places inaccurate, we are submitting our own statement of the case in very brief

form and are including record citations only where in conflict with the statement of the case by the appellants.

This is an appeal from a judgment for $48,000.00 in favor of appellee upon the verdict of a jury, in an action for damages for personal injuries, brought by Sandra Mae Nihill, a minor, against appellant, Arnold L. Lewis, the manufacturer of a home permanent wave preparation, and appellant, Rexall Drug Company, a corporation, the vendor of the product.

The appellee's mother purchased a home permanent wave kit from a Rexall Drug Store in Kensal, North Dakota. The home permanent was thereafter administered to the plaintiff who started to lose hair approximately a week to ten days later. Ultimately, and after a period of approximately four to five months, she lost most of her hair. Such loss is permanent.

At the time of the application the plaintiff, Sandra Nihill, was a normal healthy girl with no indicated allergy of any kind (R. 309-310, 332, 347-348, 630); she had no thyroid condition such as could effect or contribute to the loss of hair (R. 373-380, 392-393).

The chemical contained in the home wave solution here used contained Ammonium Thioglycolate, and said chemical is toxic through the skin as well as orally (R. 336-337, 357).

The home wave was given by a neighbor, Mrs. Jorgenson, who testified that she followed the directions exactly (R. 301); the mother of the plaintiff also testified that she was present and the directions were followed minutely (R. 403-410, 417-419, 428). Mrs. Jor-

genson testified that it was the neutralizer that she poured over and drained off the head of plaintiff (R. 289-293, 295, 304-305).

The record shows medical testimony on the chemical in the hair wave solution causing the loss of hair in plaintiff (R. 314-316, 354-357). There is medical opinion that this hair condition is permanent and three doctors so testified (R. 314, 334-335, 360).

The record shows by the testimony of Mrs. John W. Nihill that when Sandra's hair began falling out, "she was hurt", and that many times she found her crying, and would ask her what was wrong. She wouldn't tell. She began to get embarrassed. She didn't want to go out with the Nihills. She didn't even want to wear her dresses and when a new dress was suggested would say, "Oh, I can't wear that, I can't look dressed up". She refused to go to the Junior Prom and cried that night; that Sandra Mae would never admit why she was crying; that she would never admit that she had been injured; that her marks in school have gone down; that it has affected her whole personality; that she has no self-confidence any more; that she has no boyfriends, and that she used to have admirers (R. 412-414).

Mrs. Nihill was a subscriber to the "Farm Journal", a monthly periodical. The defendant, Rexall Drug Company, had advertised extensively for three years in many periodicals, including the "Farm Journal"; these advertisements carried warranties to the public in general; Mrs. Nihill read them and relied upon them; the home wave kit contained a written

guarantee which was read by Mrs. Nihill before purchase and relied upon.

ARGUMENT.

I.

THE EVIDENCE WAS SUFFICIENT TO ESTABLISH ACTIONABLE NEGLIGENCE AGAINST THE APPELLANT MANUFACTURER.

It has been universally recognized by the courts that in cases of product liability, direct proof of negligence of the manufacturer is extremely difficult on the part of an injured plaintiff. Nevertheless, in this case, there was direct proof of negligence going far beyond the proof shown in most of the reported cases. The record shows:

1. The undisputed evidence of both plaintiff and defendants shows that the particular batch of cold wave used by the plaintiff came from Batch #181, and was purchased from a small country drug store in a town of 200 to 300 persons in February of 1955; that after the application and injury, another kit was purchased from the same drug store in June of 1955 by the plaintiff, and the proof shows that this was from Batch #181; that two other local residents purchased the same home wave kits from the same drug store the first part of March 1955, in between the two purchases of plaintiff, Mrs. Carl Carlson and Mrs. Donald Carlson (R. 533, 526-527). The testimony clearly shows that this was a Cara Nome Pin Curl Wave (R. 531-534); that these two persons had also a disastrous loss of hair, the only difference being that

½ PRICE

CARA NOME DEODORANT CREAM FOR WOMEN
Stainless, quick-vanishing base; protects after-bath freshness for hours.
Reg. $1.00 2 Oz. Jar Only 50¢

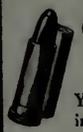
STAG DEODORANT CREAM FOR MEN Checks perspiration from shower to shower; won't harm your finest shirts.

Reg. 50¢ 1½ Oz. Jar Only 25¢

REXALL *DeLuxe* TOOTHBRUSHES
Each 59¢
Six medically approved styles with long-lasting Hyzon bristles, soft, medium or hard texture; two styles with natural bristles.

Beauty Special
SAVE MORE THAN ¼

Ann Delafield FACE POWDER (Regular or Compressed)
AND
Ann Delafield LIPSTICK
A $2.75 Value BOTH, ONLY $1.98



Your choice of 5 flattering shades in both powder and lipstick.

REXALL ASPIRIN

200's Reg. 87¢
ONLY 66¢
Less than ½ cent a tablet at this special low price during March.

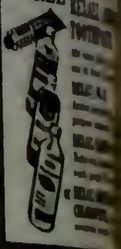
***New* REXALL SKIN ANTISEPTIC**

1 oz. bottle with applicator 33¢
Effective first-aid application for minor cuts, scratches, abrasions.

Sweet Tooth Special
HOMEMADE CHOCOLATE PEPPERMINT PATTIES
1 Lb. 69¢ Value Only 59¢

24 extra-large, fresh, creamy patties with rich chocolate coating.
American Custom Chocolates. Our finest assortment. 1 lb., $2.00
Kitchen Fresh Cottage Chocolates. Dairy-fresh creams, fruit centers, nuts. 1 lb. $1.10
2 lb. $2.20

FREE



MARCH REXALL

For Greater Savings at Drug Stores Everywhere

***NEW!* MITTENETTES** Reg. 50¢ now 39¢

For dishwashing, dusting, house cleaning, etc. Crepe-rubber mitts slip on easily, give finger-freedom and protection. Assorted colors.

SPONGE-CHAMOIS COMBINATION Genuine oil-tanned chamois plus large cellulose sponge. $2.69 value.....now $1.69

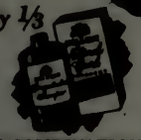
MOTH FUME CRYSTALS. Kill clothes moths, larvae! Odor vanishes in fresh air. Full pound, 79¢ value, only.....43¢

Cannon Dusting Cloth, 18" x 18".....only 23¢
Plastic Bib Apron.....only 23¢
Acco Bleached Cheesecloth, 4 yds. x 1 yd. wide....only 13¢
Elkay's Aerosol Air Refresher, 5 oz.....98¢
Window Cleaner.....23¢

BEAUTY BUYS

Save nearly ⅓

$3.50 value Both for $1.89



CARA NOME COMBINATION
Cara Nome Natural Curl Permanent, with "Neutralock" Neutralizer, assures soft, natural-looking waves from very first day. Choice of three kits for three different types of hair—normal, dyed or bleached, and grey or white hair.
Cara Nome Concentrated Shampoo conditions and beautifies hair, brings out natural sheen. Excellent cleaning action, penetrating properties; equally effective in hard or soft water—for all hair types.

CARA NOME COMBINATION
Peroxide U.S.P. 6% 20 vol., 4 oz.
FREE with purchase of any
CARA NOME Color Shampoo
Reg. $1.50 value Only $1.25

Both for the price of the shampoo! Cleanses, colors, conditions; not a bleach, not a rinse. Choose from 12 glamorous shades.

CARA NOME "Natural Curl" Permanent for Little Girls
Complete $1.50

Designed especially for girls age 2 to 12. Mild lotion and gentle-acting "Neutralock" Neutralizer assures safe, natural-looking curls for fine, "baby-soft" hair.

CARA NOME Liquid Lanolin Compound
4 oz. bottle $1.50

Exciting new lotion for "the one woman in ten with sensitive skin." As hair conditioner, it highlights natural beauty...as skin cleanser and emollient, this hypo-allergenic compound keeps complexion and hands radiantly lovely.

Three Lovely Lotions Just $1.00 each

CARA NOME, peach-blush pink, 6 oz. bottle
WHITE MINK, frosty blue.....6 oz. bottle
SPRINGWOOD, carefree yellow..6 oz. bottle
Cool, creamy lotions to protect the satin-smoothness of your skin and grace your dressing table. Each beautiful color a delightfully different fragrance.

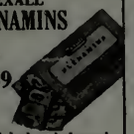
Cara Nome Make-up Stick conceals minor blemishes. Non-drying, non-greasy, 5 smart shades $1.50

Cara Nome Hair Rinse leaves hair soft, lustrous after shampoos and home permanents. 8 oz.....$1.00

Helen Cornell Hair Bandeau, smart-looking wide band to keep hair neat; elasticized, silky, knit-mesh, 39¢

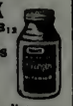
VITAMIN VALUES

REXALL PLENAMINS
72's $2.59



One of the best-balanced formulas known. Ten vitamins plus Iron, Liver Concentrate, Vitamin B_{12}. You get more than minimum daily requirements of *all* vitamins with known minimums.

REXALL MINERALIZED B COMPLEX With Vitamin B_{12}
100 Capsules $5.95



This *balanced* diet-supplement provides 9 B Vitamins, 11 mineral trace elements, Liver, Iron, Vitamin C. Each capsule gives more than minimum daily requirement of B_1, B_2 and Iron.

REXALL MULTI-VITAMIN FORMULA V-10
Pint $1.98

Pleasant-tasting liquid formula supplies twice the minimum daily requirement of Vitamin B_1, 5 times the requirement of Iron, plus Vitamins A, D, B_2 and B_{12}. Ideal for convalescents.

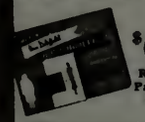
She found a new life when she lost 65 pounds with Ann Delafield's REDUCING PLAN

"Can you imagine the thrill of losing all the excess pounds you want ... *without starving, counting calories, or taking a drug?* It was the *first* time Nora Lacey met any success in losing weight, and she actually gained pep and energy while reducing!

"*It's easy—it's fun,* when you lose weight my way ... the *natural* way. And the wonderful thing is you lose it *for good* because my plan is a lifetime beauty plan."

Ann Delafield

"Start Today—Like Yourself Better Tomorrow"



YOU GET...
1. Big 120-page beauty book
2. 30 days' supply of Appetite Reducing Wafers
3. 30 days' supply of Vitamins

$6.95 Repeat Package $6.95

"Now I'm able to do the things I've always wanted. I'm not ashamed to go skating, dancing and to have all the fun I missed before. It's like being born all over again!"
Nora Lacey *(address on request)*

MEN For the first time ... a safe, sound scientific reducing plan for you! Ask for the Delafield 10-Day Quick Way. Repeat Package, 2.50 $3.50 Complete

You can depend on any drug

Rexall drug products are guaranteed to give satisfaction or your money back

YOUR MEDICINE CHEST CHECK LIST

BISMA-REX, Rexall's exclusive formula for quick, prolonged relief from acid-indigestion. Neutralizes excess stomach acidity; eases gastric distress; soothes irritated stomach membranes. 4¾ oz...89¢

REXALL ANAPAC combines antihistamine and APC Compound for quick, effective relief from cold symptoms in *all* stages—from warning sniffles to the aches and pains of fully developed colds. 15's, 49¢

REXALL CHERROSOTE, a time-tested cough syrup. Fights coughs from colds two ways: relieves "tickling throat"; loosens phlegm. Local anesthetic action soothes throat irritation. 8 oz., 98¢

REXALL CELUBEX LAXATIVE...a safe, modern dosage for constipation that promotes natural lubricating bulk, plus gentle laxative action for relieving temporary constipation. 65's...

REXALL BIOKETS, pleasant-tasting throat troches; combine local, pain-relieving ingredients with antibiotic action of Tyrothricin. Help "head-off" coughing spells and soothe minor throat irritation. 15's.....69¢

REXALL NASOTHRICIN *double-action* nose drops relieve nasal congestion, inhibit many bacteria, cover nasal passages more completely. Contain Tyrothricin and a vasoconstrictor. ½-oz. bottle and dropper.....69¢

REXALL LOZOTHRICIN, cherry-menthol flavored lozenges that combine pain-relief of aspirin with antibiotic action of Tyrothricin to soothe and help relieve coughs due to colds. Inhibit many bacteria. 12's .....69¢

REXALL COLD KIT, *four* laboratory-tested remedies for immediate treatment of family colds: Cherrosote Cough Syrup, Liquid Chest Rub, Nasothricin Nose Drops, Cold Tablets. Total value, $1.75 complete kit, only.....

REXALL LIQUID CHEST RUB...a new, *stainless, grenseless* chest rub that can also be used as inhalant in steam vaporizer. Deep-penetrating for quick relief from surface congestion. 2 oz., 79¢

REXALL OROTHRICIN antiseptic-antibiotic mouthwash and gargle. Freshens breath, inhibits organisms susceptible to Tyrothricin. Penetrates thoroughly, gives more complete coverage. ½ pt., 98¢

REXALL ASPIROIDS WITH ANTIHISTAMINE. Combines two tested remedies to give better all-around relief for discomforts associated with colds—headache, muscular pain and fever. 30's, 98¢

AEROSOL REX-SALVINE for Burns. Finger-tip controlled, antiseptic spray forms protective film to prevent infection, promote healing. Soothing, easy to use. 5 oz. ...$1.39

Chuckle with Amos 'n' Andy every Sunday, 7:30 p.m. EST, CBS Radio Network.

Right reserved to limit quantities. Prices subject to Federal Excise Tax where applicable. Items and prices may vary slightly in Canada. Rexall Drug Company, Los Angeles 48, California.

product that bears the name REXALL

the hair loss did not remain permanent, but grew back in.

2. That the bobby pins used in the process of the pin curl wave by the plaintiff and the other two parties were badly rusted and corroded in the morning after the wave.

3. That the solutions used by the plaintiff and the other parties smelled very strongly, smarted the eyes and stung the skin.

4. That the defendant, Arnold L. Lewis, by interrogatories, maintained that there was 5% Ammonium Thioglycolate used in the solution when, as a matter of fact, subsequent tests showed that there had been a 7% solution used, or, in other words, a 40% increase in the solution over that percentage testified to by the defendant as the intended or presumed percentage (R. 174-176).

5. The defendant himself, Arnold L. Lewis, in attempting to explain this difference, testified that at the time he answered "five percent" he thought the question was referring to the "little girls' home wave". The record shows that he knew the plaintiff was fourteen years of age at the time of the application (R. 677-682). He further testified that the "little girls' permanent wave kit" was for girls from 5 to 17 (R. 677). The advertisements in evidence positively state that the "little girls' kit" is for girls from 2 to 12 (Plaintiff's Exhibit 20, inserted opposite).

6. Dr. Melton testified that Ammonium Thioglycolate was toxic, and this was also admitted to by their own chemist. The medical testimony for the plaintiff

clearly shows that Sandra Mae Nihill had no skin allergy of any kind, and that her skin was not peculiarly sensitive to this or any other cosmetic.

The brief for the defendant, Arnold L. Lewis, argues throughout the weight of the testimony, which argument was proper when presented to the jury. But the brief totally overlooks the fact that it is a settled principle of law, that on appeal the facts must be viewed in the light most favorable to the prevailing party.

Therefore, we respectfully submit that there was adequate, direct proof of negligence to go to the jury.

II.

RES IPSA LOQUITUR.

The second contention of the defendant, Arnold L. Lewis, is that the doctrine of res ipsa loquitur was inapplicable, and if applicable, was improper in the form given by the court in the case at bar.

This contention is untenable and must be answered in several different ways. First, practically all jurisdictions concede the outstanding difficulty of the ascertainment and direct proof of some negligent act on the part of a manufacturer, and have answered this difficulty by allowing an inference of negligence by means of the maxim res ipsa loquitur. Where the defect is of the sort that does not ordinarily occur without the negligence of someone, where the product was within the defendant's exclusive control at the time during which the defect must have occurred, and where the possibility of contributing conduct which

would make the plaintiff responsible has been eliminated, this rule holds that there is sufficient evidence to justify a jury's *inferring* a specific act of negligence on the part of the defendant. Prosser, Torts 199-217 (Second Edition, 1955). In some jurisdictions this inference may be permissive, as in California, while in other jurisdictions this inference is presumptive. In *Burr v. Sherwin Williams Co.,* a 1954 California case, 268 P. 2d 1041, the California Supreme Court, by way of dictum, proposed that in all res ipsa loquitur cases the defendant must rebut the inference of negligence or be faced with a directed verdict for the plaintiff. For an excellent discussion of this aspect of the case see Note, 43 Calif. L. Rev. 146 (1955). In Pennsylvania the doctrine is known as "exclusive control", *Loch v. Confair,* 93 A. 2d 451. Maine, Michigan and South Carolina achieve the same result with "circumstantial evidence", *Lajoie v. Bilodeau,* 93 A. 2d 719; *Pattinson v. Coca Cola Bottling Co.,* 52 N.W. 2d 688; *Merchant v. Columbia Coca Cola Bot. Co.,* 51 S.E. 2d 749. Rhode Island allows an "inference of negligence" where res ipsa loquitur is not applicable, *Minutilla v. Providence Ice Cream Co.,* 144 Atl. 884.

Secondly, there can be no doubt that the law of the State of North Dakota is controlling in the case at bar. The brief of the defendant seems to presume, at all times and on all questions, that where the North Dakota Court has not spoken that the law of California applies. This whole theory is erroneous. The function of a Federal Court sitting in a diversity case is to apply the law of the controlling state *as the highest court of that state would have interpreted it had the*

question been presented to it. Luther v. Maple, 250 F. 2d 916.

Fortunately, it is not necessary, in this case, to resort to speculation upon the probable legal conclusions of the North Dakota Supreme Court as that court has spoken very clearly on almost identical situations as the case at bar. The first expression of the North Dakota Supreme Court on the inference of negligence is almost identical with the case at bar. In *Burt v. Lake Region Flying Service,* a North Dakota case decided in 1952 (54 N.W. 2d 339), the facts were these: Plaintiff, a farmer, entered into a contract with the defendant for the chemical spraying of certain farm crops. Plaintiff claimed that under that contract certain fields were carelessly and negligently sprayed by the defendant causing the production of oats in such fields to be retarded and injured. Upon the trial of the case the jury rendered a verdict in favor of the plaintiff. Prior to the submission of the case to the jury, the defendant made a motion for a directed verdict on account of the insufficiency of any evidence of negligence on its part. Said motion was denied. After verdict for the plaintiff, motion for judgment notwithstanding the verdict of the jury was made upon the same grounds of insufficiency of the evidence as to negligence. This motion was denied. Defendant appealed to the Supreme Court of North Dakota. The record is completely devoid of any proof of negligence. But, after spraying of the chemicals on certain fields, the plaintiff noticed that the oats were of a "dirty brown color". He then noticed other differences in the growth of the stools and a lack of kernels

in the heads. The proof further disclosed that the oats sprayed were inferior to oats not sprayed.

The North Dakota Supreme Court held:

"Clearly there is sufficient evidence from which a jury of reasonable men . . . could draw the inference that the damage to the oats was caused by the spray. *While there is no direct evidence of any negligence by the defendant, the circumstances were such that the jury could draw the inference that there must have been negligence by the defendant in the mixing or the application of the spray. There is no other reasonably proper explanation.*" (Italics that of the briefer by way of emphasis.)

"It is true that a verdict of negligence cannot be made to rest on mere speculation or conjecture. The evidence must present more than a mere possibility that the injury occurred in a particular way. However, it is likewise true that negligence, like any other fact, *may be proved by circumstantial evidence, and that such evidence is sufficient to sustain a finding or verdict if it shows that in all reasonable probability the plaintiff's injuries were the proximate result of the defendant's negligence.*"

"Negligence may be inferred from circumstances properly adduced in evidence, provided those circumstances raise a fair presumption of negligence; and circumstantial evidence alone may authorize the finding of negligence. Circumstantial proof relied upon need not be of the degree to expel all other probabilities, and will be sufficient to submit the issue to jury and to sustain its verdict based thereon, if the proof coincides with logic and reason and with that which a rea-

sonable mind would conclude from the testimony adduced."

In the above quoted case, the law of which is controlling in the case at bar, the Supreme Court of North Dakota conceded that there was *no* evidence of *any* negligence, and still allowed the inference of negligence from the circumstances or damage after application. In the case at bar there is much direct evidence of negligence, as set forth above. Hence, the case at bar is much stronger than *Burt v. Lake Region Flying Service.* Aside from this, the cases are almost identical. The whole theory of the complaint in negligence was based upon and drawn in compliance with *Burt v. Lake Region Flying Service.* In that case a chemical was purchased to spray crops. In this case a chemical was purchased to apply upon the head for a permanent wave. In that case the chemical was applied to the crops according to all of the rules and directions; in this case, the chemical was applied to the head in conformance with all the rules and directions. In that case there was a subsequent damaging to the crops; in this case there was a subsequent damage to the hair. In that case there was a conflict in testimony as to the cause of the crop damage or the extent; in this case there is a conflict in the testimony as to the cause of the hair loss and its extent. But, in both cases, under the ruling of the North Dakota Supreme Court, the inference of circumstances is clearly a question for the jury.

Just this year the North Dakota Supreme Court again passed upon the question of res ipsa loquitur as

applicable to the case at bar, in *Kuntz v. McQuade,* 95 N.W. 2d 430. The facts in that case were briefly these: The action was against a manufacturer-bottler for injuries sustained by a tavern keeper's infant son when a beer bottle exploded in a cooler. The jury returned a verdict in favor of the defendant. The plaintiff moved for a new trial, which was denied, and upon which denial the appeal was taken. The evidence did not disclose the cause of the explosion. There was no evidence of direct negligence. The case was tried upon the stipulated theory of all parties that the doctrine of res ipsa loquitur was applicable, but that the doctrine itself gave rise to permissible inference of negligence rather than to a presumption of negligence. For this reason the North Dakota court did not directly pass upon either the applicability of the doctrine nor the form of the instruction. However, their reasoning on the applicability of the doctrine itself is clear, leaving only one question still undecided; that question being, is the North Dakota court going to follow the line of decisions that hold that the doctrine of res ipsa loquitur creates merely an inference of negligence, or that line of cases which holds that the doctrine of res ipsa loquitur creates a presumption of negligence. In the case at bar, the instruction itself is for a mere inference of negligence with the clear admonition that such inference is rebuttable by proof of non-negligence on the part of the defendant. In *Kuntz v. McQuade,* supra, the North Dakota Supreme Court said:

> "The plaintiffs had the burden of proof and while the doctrine of res ipsa loquitur gave them an assist it was not conclusive on the jury. No abuse

> of discretion is shown or found on the part of the trial court in denying the motion for a new trial. *The jury refused to draw the inference permitted them by the instruction given as requested by the plaintiffs.* That is the end of the matter." (Italics that of briefer)

Once again the North Dakota court has clearly looked with approval upon the submission to a jury in products liability cases of the theory of res ipsa loquitur. There can be no doubt that the North Dakota Supreme Court would hold res ipsa loquitur applicable in the case at bar, and let the jury decide the facts.

Thirdly, the brief for the defendant cites *Farmers Home Mutual Ins. Co. v. Grand Forks Imp. Co.,* 55 N. W. 2d 315. That case, however, has nothing to do with the case at bar. The plaintiffs were trying to establish the doctrine of res ipsa loquitur, not for the purpose of proving a prima facie case of negligence, but for the purpose of proving proximate cause. In the case at bar the testimony must be viewed in a light most favorable to the prevailing party, and there is clearly expert testimony throughout the record that the loss of hair was occasioned by the application of the home wave solution; that the plaintiff was a normal, healthy girl; that she had no allergies nor peculiar sensitivities; that there was no other reason for her hair to fall out starting within six or seven days after the application of the home wave, and even though there is testimony on the part of the defendants that the solution was not the cause of the loss of hair, this testimony is totally immaterial in view of

the jury's finding a belief and a conviction in the truth of the testimony of plaintiff's witnesses.

Then, add to this the testimony of the defendant's doctor himself, Dr. Henry E. Michelson, of Minneapolis, Minnesota, that the damage to the hair of the plaintiff was caused by "chemical interference" (R. 637).

Lastly, the defendant objects to the form of the instruction. Suffice it to say on this question that the instruction was taken almost in its entirety from *Bish v. Employer Liability Insurance Company,* a very recent federal case reported in 236 F. 2d 62.

III.

INHERENTLY DANGEROUS PRODUCT.

The brief of the defendant, Arnold L. Lewis, quarrels with the instruction of the court on the duty owed to the public by the manufacturer of a product that is "either inherently dangerous or reasonably certain to be dangerous if negligently made". It must be noted that the court in that instruction did not place any greater degree of care upon the manufacturer, but clearly stated in the instruction that the duty of the manufacturer "is to exercise *ordinary care* to the end that the product may be safely used for the purpose for which it was intended. . . . Failure to fulfill that duty is negligence".

We respectfully point out that counsel for the defendant has not submitted a single case to this court to support his contention that the instruction is even

erroneous, much less prejudicial error. We feel his contention falls for two reasons:

One, the record clearly shows testimony that ammonium thioglycolate is toxic by the testimony of Dr. Melton for the plaintiff, and conceded to be a fact by both Dr. Starr and Dr. Jeffreys for the defendant. Webster's definition of toxic is "poisonous". Anything which is poisonous is inherently dangerous or reasonably certain to be dangerous if negligently made.

Two, if the chemical was not toxic and was not to be classified as inherently dangerous, the instruction could be prejudicial error only if the burden of a greater degree of care had been placed upon the manufacturer. This not having been done, then even if we were to say that the instruction were erroneous, it by no means could be prejudicial and reversible error.

IV.

THE DEPOSITIONS OF MRS. DONALD CARLSON AND MRS. CARL CARLSON.

The defense objects to the introduction in testimony of the depositions of Mrs. Donald Carlson and Mrs. Carl Carlson. The only objection made is as to foundation and, hence, no necessity to argue any other phase of the testimony. Wherein is there any failure in foundation? The defendant was represented by attorney at the time of the taking of the deposition. The record clearly shows that Kensal is a small country town of 200 to 300 people. The record shows that the

purchase of the product by plaintiff was made at the Rexall Drug Store in Kensal, North Dakota, in February of 1955, and that it was Batch #181. The record further shows that the plaintiff purchased another bottle of the solution from the same Rexall Drug Store in Kensal in June of 1955, and that this was also from Batch #181. Then, it is the testimony of both Mrs. Carl Carlson and Mrs. Donald Carlson that they made their purchases from the same Rexall Drug Store in Kensal, North Dakota, in March of 1955, in between the February and June purchases of the plaintiff. The inference is clear that the purchases of Mrs. Carl Carlson and of Mrs. Donald Carlson were also Batch #181, the identical batch which caused the damage to the hair of plaintiff. Even if this were not true and were not from the same batch number, the testimony would be admissible by mere virtue of the fact that it was the same product. *Carter v. Yardley & Co., Ltd.,* 64 N.E. 2d 693.

What other foundation is missing? Mrs. Donald Carlson testifies that she had used home wave solutions many times, and that in this particular case she followed the directions meticulously and carefully (R. 528). She testifies that as a result of the application of this home wave solution, the hair broke off while combing it, and that this started to happen no less than a week or no more than two weeks after the application (R. 529). She testified that the solution rusted the bobby pins. She was obviously using the same pin curl wave as she testified to the fact that the hair was put up in pins, that it rusted the bobby pins,

and that you took the bobby pins out the next morning; that the "Cara Nome" was the only bobby pin permanent that she ever had (R. 530). Counsel for the defendant himself asked about the pin curls (R. 531).

Mrs. Carl Carlson testified that after the purchase at Kensal from the Rexall Drug Company in March of 1955, she thoroughly read the rules and directions and meticulously followed the directions (R. 533); she testified that the solution was put on in pin curls (R. 534); that when she took the bobby pins out the next morning they were all rusty; that her hair was just like straw, and that upon combing her hair "her shoulders were just loaded with broken off short hair (R. 535); that she had never used any bleaching substance on her hair or peroxide or anything of that type, and that her daughter, Mrs. Donald Carlson, had never done so (R. 536).

It is obvious that there was ample foundation for the introduction of the testimony of the two Carlsons, and that their testimony was material.

It might also be well pointed out at this point that if the depositions of Mrs. Carl Carlson and Mrs. Donald Carlson were not admissible for any other purpose, they would still be admissible for the purposes of impeachment.

The proof introduced by the defendant stated that there had been only about eight complaints per year on their Cara Nome Home Wave solutions. Here we are able to show three bad complaints in one little, small, rural community in North Dakota.

V.

DAMAGES.

The briefer does not feel that the claim of excessiveness of the damages merits more than a passing comment. When a little fourteen year old girl ends up permanently bald headed, the damage to her appearance, her personality, her feelings and her emotions are so immense as to be almost beyond personal appreciation or comprehension of anyone unassociated with the injury. Her entire happiness is damaged; her future relations with the opposite sex, and even her marriage possibilities and probabilities are damaged; her future income is damaged. This damage and its computation is strictly for the jury, and it is difficult for the briefer tó visualize any verdict they might have assessed as being excessive.

CONCLUSION.

It is respectfully submitted that the record is completely void of any error requiring a new trial herein. There was positive, actual and direct evidence of negligence on the part of the defendant, Arnold L. Lewis; the case above and beyond that was properly submitted on res ipsa loquitur, and the jury arrived at a just and moderate verdict.

THE DEFENDANT AND APPELLANT, REXALL DRUG COMPANY.

Many of the contentions of the defendant, Rexall Drug Company, have already been answered in the foregoing brief in reply to the brief of the defendant, Arnold L. Lewis. Where this is true, plaintiff will not repeat. This leaves only three points to be argued: One, was there an express warranty; two, did the plaintiff or her mother rely on said warranty; three, is there necessity for privity in breach of an express warranty between manufacturer or distributor and the consumer in cosmetics containing chemicals applied to the human body?

I.

WAS THERE AN EXPRESS WARRANTY?

The witness, Thomas Henry Stark, was the assistant manager of the Insurance and Taxation Departments of the Rexall Drug Company and his job, among other things, was the supervisor of claims against Rexall. He was asked to produce and did produce advertising mats of ads run by the Rexall Company in the years 1953 and 1954 (R. 190). These ads were run in "Life", "Saturday Evening Post", and the "Farm Journal" (R. 152). These advertising mats were eighteen in number and were identified as Exhibits 8 through 25 inclusive. The briefer for illustrative purposes has included a photostat of Exhibit 13, inserted opposite, as being representative of all of the Exhibits,

ELKAYS

Insect Killer

Reg. $1.29
Now only
89¢

Quick, push-button exterminator of flies, mosquitoes, flying moths, fleas, silverfish, water bugs, gnats and other flying insects. Non-staining and non-injurious when used as directed. 12 oz. Aerosol.

4¾ oz.

89¢

INDIGESTION?

Get Quick, Prolonged 4-Way Relief with REXALL BISMA-REX

Neutralizes excess stomach acid in less than 1 minute—yet relief is prolonged. The ingredients in this effective Rexall formula quickly ease gastric distress and heartburn caused by food fermentation —and prolong relief by leaving a protective coating on the stomach membranes. Economy 1-lb. size.....$2.09

Bisma-Rex Gel. Liquid Antacid. 6-ounce bottle, only.....$1.19

Bisma-Rex Mates. Easy-to-take antacid tablets. 75's.....89¢

Try These Easy-to-Use, Push-Button AEROSOL AIDS

Rexall Insect Repellent. New, convenient spray for skin and clothing. Keeps away flies, mosquitoes, gnats and fleas. 5-ounce.....$1.59

Rexall Poison Ivy Lotion quickly relieves smarting and itching; helps prevent spreading of ivy, oak and sumac irritation. 5-ounce.....$1.69

Rexall Sunburn Cream. Gentle foam swiftly soothes pain; forms a protective film that prolongs relief from itching, irritation. 5-ounce..$1.49

Elkays Moth Proofer kills both moths and eggs. One spraying lasts a year, for clothing, closets, drawers and storage areas. Won't stain when used as directed. 12-ounce $1.95

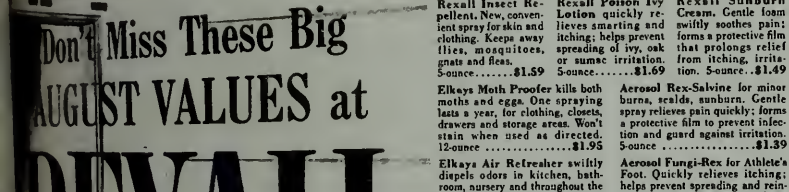
Elkays Air Refresher swiftly dispels odors in kitchen, bathroom, nursery and throughout the house. Push-button spray sweetens the air in any room. 5-ounce, 98¢

Cara Nome Hand & Body Foam, fragrant, fluffy lotion protects hands and body from roughness, redness and windburn. Just press the button and creamy foam billows out. 5-ounce.....$1.25

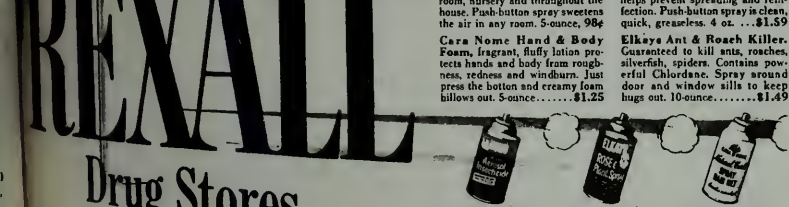
Aerosol Rex-Salvine for minor burns, scalds, sunburn. Gentle spray relieves pain quickly; forms a protective film to prevent infection and guard against irritation. 5-ounce $1.39

Aerosol Fungi-Rex for Athlete's Foot. Quickly relieves itching; helps prevent spreading and reinfection. Push-button spray is clean, quick, greaseless. 4 oz. ...$1.59

Elkays Ant & Roach Killer. Guaranteed to kill ants, roaches, silverfish, spiders. Contains powerful Chlordane. Spray around door and window sills to keep bugs out. 10-ounce.....$1.49



Don't Miss These Big AUGUST VALUES at REXALL Drug Stores



Elkays Insecticide with Methoxychlor. Contains no DDT. Kills flies, roaches, mosquitoes, ants, moths, fleas, bedbugs. 12-ounce $1.89

Elkays Robe & Plant Spray for indoor and outdoor use. Kills spider mites, leaf hoppers, aphids, thrips, and white fly. 12-ounce $1.69

Cara Nome Spray Hair Net with lanolin to leave your locks as lustrous as a model's. Helps keep hair "sculpture-neat." 5-ounce aerosol, $1.50

Rex-Maid Rubber Gloves,	Natural latex rubber; non-slip finish. Reg. 79¢	39¢
Rexall Aspirin,	No finer, faster-acting aspirin made. Family-size, 200-tablet bottle, reg. 67¢, now only.....	66¢
Klenzo Facial Tissues,	Soft absorbent tissues for many uses. Boxes of 300 tissues.....3 for	67¢
Cape Cod Vacuum Bottle,	Keeps liquids hot or cold. Pint, $1.59 value, now only.....	$1.39
Reel-Roll Cotton,	Handy dispenser lets you pull out cotton as needed. Rest stays inside, clean, ready for use. 1½ oz.	43¢
Rexall Sunburn Cream,	Quickly relieves itching and burning, lets you sleep easier. 3-oz. bottle.....	69¢
Alco-Rex,	Cooling, invigorating body rub that relieves simple muscular aches and pains caused by overwork, overexercise. Pint.....	49¢

A LUXURY BUY AT A LOW, LOW PRICE

Save 51¢ on Ann Delafield's All-Purpose Deep Cream and Skin Freshener

Now you can give yourself luxurious "beauty parlor" facials every day at home! Smooth on this rich All-Purpose Cream that penetrates the pores deeply, lubricates, cleanses, conditions and smooths. Remove cream and pat on Skin Freshener to stimulate and "tone up" the skin, leaving your complexion fresh, clear and glowing. These two exclusive formulas have everything you need for true, professional-type facials and complete complexion care. Save on both with this unusual special offer (limited time only). 2.35 oz. Cream: 6 oz. Freshener.

Total $3.00 Value **$2.49** *Both Only*

Drug Products Are Guaranteed to Give Satisfaction or Your Money Back

CARA NOME BEAUTY BUYS

½ PRICE SPECIAL

CARA NOME FACE POWDER *Large Size* $1.25

Reg. $2.50 ONLY

Super-fine texture; clings longer, spreads smoothly and leaves your face soft as a baby's. Pure, mild, safe for most sensitive skins. Delightful fragrance.

Compressed Bath Powder: Cara Nome, $2.00; Springwood, $2.50; White Mink, $3.00

SAVE MORE THAN $1.00

White Mink Cologne 4 oz. With Atomizer Reg. $3.50 Now Only $2.49

Cara Nome Cologne with atomizer. Reg. $2.50, only.....$1.49

Cara Nome Dusting Powder Reg. $2.50 $1.50

Use lots and lots of it after the bath. You'll love its airy softness, refreshing fragrance. *Only*

Cara Nome Deodorants: Perfumed Spray, 3 oz. ...$1.10. Cream, only...60¢

CARA NOME SUNTAN CREAM LOTION

4 Oz. Only $1.25

Actually filters out many ultra-violet "burn rays"; lets you get a glorious tan. Non-greasy.

CARA NOME NATURAL CURL PERMANENT

Silky-soft from the first day. 3 types: for Normal, Bleached or Dyed, or Gray-to-White hair; and one for little girls.

$1.50

CHECK THESE SUMMER MEDICINE CHEST NEEDS

REXALL ANTIHISTAMINE TABLETS. Relieve symptoms of cold and hay fever promptly with this formula containing Pyrilamine Maleate. Tablets are small, easy to take. Follow directions on label. Bottle of 15 **49¢**

REXALL EYELO. Soothing eye-wash cleanses and relieves discomfort of tired, irritated eyes. Contains cooling camphor and antiseptic boric acid. Comes with convenient eye cup. Half-pint, only..... **69¢**

FUNGI-REX CREASELESS. Promptly relieves the itching and discomfort of Athlete's Foot; helps prevent spreading and reinfection. Neat; non-greasy; has a vanishing cream base. Easy to use. 1½-oz. tube..... **75¢**

REXALL KLENZO ANTISEPTIC. This ruby-red mouthwash, gargle and antiseptic sweetens the breath, relieves simple throat irritations. Cinnamon flavored; pleasing to children and adults. Pint, only..... **79¢**

REXALL Mi-31 ANTISEPTIC. Rexall's multi-purpose antiseptic mouthwash and gargle. Used full strength, it kills contacted germs in 30 seconds. You save with this big, full-pint bottle.. **79¢**

NEW

REX-EME MEDICATED POWDER. Quickly relieves the irritation of prickly heat, diaper rash, Athlete's Foot, poison ivy, other minor skin irritations. Dust on. 3 oz..... **59¢**

SAVE 41¢

ELI COTTON. Full 1-lb. roll of hospital cotton for family and utility use. Always have some handy for use around the house. A regular $1 value, now only..... **59¢**

SPECIAL

REXALL PLASTIC QUIK-BANDS. Flexible flesh-color adhesive bandages; waterproof. Comfortable, even on knuckles. Plain or mercurochrome. Package of 33, reg. 39¢.... **33¢**

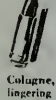
REXALL CALAMINE LOTION. This soothing pink lotion for heat rash relieves itching and irritation promptly: forms a protective layer that won't rub off the skin when dry but washes off easily in water. 4 oz. 35¢ Half-pint, only..... **57¢**

REXALL MINERALIZED B-COMPLEX. These potent tablets give you 9 important B Vitamins including red crystalline B_{12}, plus Liver, Iron, Vitamin C and 11 valuable minerals. A balanced dietary supplement. Bottle of 100..... **$5.95**

REXALL MULTI-VITAMIN FORMULA V-10. Pleasant-tasting tonic helps prevent simple, nutritional anemia; supplements diet with 5 times minimum daily requirement of Iron, plus Vitamins A, B_1, B_2, B_{12} and D. Full pint bottle..... **$1.98**

REXALL 5-X MULTI-VITAMINS. Free: 10-day trial size when you buy the 50-tablet bottle. Provide 5 times minimum daily requirement of all Vitamins with known minimums, plus red Vitamin B_{12} and Niacinamide. Both only..... **$6.95**

Have You Tried These Ann Delafield BEAUTY AIDS?



Lipsticks that stay on longer. 5 shades, $1.25

Face Powder, regular or compressed. 5 flattering shades..... $1.50

Cologne, a refreshing fragrance, lingering but subtle. 4 oz., $2.50

Eye Make-up Kit to beautify eyes, lashes. Blonde or brunette. Pretty plastic case..... $2.00 Cold color "luxury case"..$5.00

He Lost 54 Pounds and Looks 10 Years Younger

"The appetite reducing wafers and vitamins enabled me to accomplish all this with absolutely no discomfort or hunger. I had all I wanted to eat. I started feeling better immediately after starting the plan. Sports are pleasure instead of hard work. Thank you, Miss Delafield, for making reducing easy."

Ira R. Cobb
Los Angeles

WOMEN! Lose Up to 20 Pounds a Month with the Ann Delafield Reducing Plan for Women. This easy beauty-and-reducing plan gives you Appetite Reducers, Vitamins, big Beauty Book. Complete 30-day Kit, only.....$6.95

Repeat package, $5.85

MEN! Try This 10-Day Quick Way! You get Appetite Reducers, Vitamins, Reducing Book. Complete Kit of all 3, only.....$3.50

Repeat package, $2.50

You Can Depend on Any Drug Product that Bears This Name

Stag After-Shave Lotion. 3 oz. .....60¢

Rexall Sweet 'N-ete Sprinkle. Soluble sugar substitute. Gives all the taste, none of the calories. No bitter after-taste. 2¼ oz. shaker, equiv. to 200 teaspoons of sugar, 98¢

Rexall Monacet APC Tablets. Time-tested formula of Aspirin, Phenacetin, and Caffein—relieves cold discomfort. 25's.....33¢

Rexall Rubbing Alcohol A cooling, invigorating body rub that relieves minor muscular aches and pains caused by overwork or over-exertion. Reduces skin temperature. Pint.....69¢

Rexall Chlorophyll Mouth Wash. Refreshing, mint-flavored breath-sweetener and gargle. Pint.....79¢

Rexoll Corn Solvent. Painlessly removes corns and skin calluses. ½ oz. .....35¢

Rexall Mineral Oil. Extra-heavy. Relieves ordinary constipation; can be used regularly as directed because action is entirely mechanical. Tasteless, odorless, non-habit forming. Not fattening. Pint.....69¢

Fungi-Rex Powder. Quickly and effectively relieves the itching discomfort of Athlete's Foot. Stops itching, soothes burning, helps prevent reinfection. 4 oz. .....59¢

Rexall Liquid Insect Repellent. 2 oz., 59¢

Rexall Milk of Magnesia Tablets. In handy, pocket-size tin. 36 tablets.....23¢

Rexall Boric Acid. Makes soothing solution for use in eyes, on nose, throat, and skin. Powder or crystals. 2-oz. container, 26¢

Rexall Epsom Salt. For temporary relief from constipation. 1 pound.....41¢

Rexall Stork Nursette. Complete baby feeding unit lets you make up formula for day in advance, keeps it sanitary for storage in refrigerator until needed. 35¢ each.....3 for $1.00

Rexall Flavored Aspirin for Children. Pleasant-tasting, orange-flavored. 50's. 35¢

Hy-De-Way Folding Syringe. More than 2 qts. capacity. With carrying case....$4.95

Rexall Hygienic Powder. Spray or gargle, soothes minor skin irritations. 6 oz., 75¢

Rexall Gypsy Cream. Cooling lotion relieves, soothes itching, burning of sunburn, other minor skin irritations. 8 oz. .....69¢

Cape Cod Lunch Kit with pint vacuum bottle. A roomy, sturdy, well-built kit, all metal. Perfect for school children and for the working man in the family. A $2.79 value, only $2.49

Rexall Foot Powder. Relieves discomforts of tired, tender, burning feet. Absorbs perspiration, destroys odors. Helps prevent irritation by reducing friction. 4 oz. .....39¢

Rexall Eudicalma Cream. Soothes, relieves minor skin irritations. 1½-oz. tube, 65¢

Rexall Zinc Oxide Ointment. Protects irritated skin, promotes healing. 1 oz., 23¢

Stag Spray Deodorant. Unbreakable plastic squeeze-bottle for quick, easy application. Gives effective protection from underarm odor, retards perspiration. 3½ oz. ..98¢

Rexall Glycerin Suppositories. Firm yet pliable. Adult or infant, 12's.....43¢

Rexall Pro-Cap Adhesive Tape. "Tri-Wide"—¼, ½ and ¾" widths on one spool. Waterproof. 5 yards.....59¢

Rexall Eudicaine Ointment. Relieves discomfort of sunburn, minor skin irritations, superficial burns, diaper rash. 1-oz. tube, 59¢

Rexall DeLuxe Toothbrushes. Hyzon bristles in 6 styles, or natural bristles in 2 styles. Soft, medium or hard textures...59¢

Cotton Squares, box of 40.....23¢

Rexall Cotton 'n Swabs......89¢

Rexall Couze Quik-Pads, 12's.....30¢

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Double your money back if you don't agree

REXALL ANAPAC

is the best COLD REMEDY

28

GUARANTEE

If you don't agree that Rexall Anapac is better than any other Cold Remedy, simply mail the unused portion and container together with a signed letter stating why you found this product unsatisfactory, to Rexall Drug Company, Dept. F, 8480 Beverly Blvd., Los Angeles 54, Calif., and we'll give you twice the original purchase price in return.

Double your money back if you don't agree

CARA NOME NATURAL CURL

is the best HOME PERMANENT

GUARANTEE

If you don't agree that Cara Nome Natural Curl is better than any other Home Permanent, simply mail the unused portion and container together with a signed letter stating why you found this product unsatisfactory, to Rexall Drug Company, Dept. F, 8480 Beverly Blvd., Los Angeles 54, Calif., and we'll give you twice the original purchase price in return.

8 through 25 inclusive. It will be noted that there are two express warranties on this exhibit. The first says, "Rexall Drug Products are Guaranteed to Give Satisfaction or Your Money Back". The second says, "You can Depend on Any Drug Product that Bears This Name REXALL".

The plaintiff's mother, Mrs. John Nihill, testified that she keeps and subscribes to the "Farm Journal", one of the periodicals conceded by the defendant to carry their ads. She testifies that she has seen the ads of Rexall, including Cara Nome Pin Curl Waves, in these periodicals, and that she read those ads prior to February 5, 1955, and that she had seen them advertised for about two years, and that this was the reason she purchased Rexall Cara Nome (R. 400-401).

It was testified to by Mrs. Nihill that Exhibit 28 was a part of the Cara Nome Rexall Kit purchased by her at the Rexall Drug Company (R. 402). A photostat of this exhibit is inserted opposite. It states:

"Double your money back if you don't agree
CARA NOME NATURAL CURL
is the best HOME PERMANENT
GUARANTEE"

Mrs. John Nihill further testifies that Exhibit 7 was seen by her on the counter where there was "a pile of them with his display of Cara Nome Home Pin Curl" (R. 401-402). This is verbatim the exact same

guarantee included in the wave kit itself. A photostat of Exhibit 7 has been inserted opposite. Then, we have the phenomenal situation of both the defendant manufacturer and the defendant distributor disclaiming any knowledge of or connection with these two express warranties, one contained in the kit itself, and the other a part of the display material of the retailer. This denial, in the face of the printed Rexall guarantee, including the return address of the Rexall Drug Company in Los Angeles, is ridiculous.

Long ago in 1894 the Supreme Court of the State of North Dakota in *Hazelton Boiler Company v. Fargo Gas and Electric Company,* 61 N.W. 151, where the sale of an upright steam boiler was involved, construed the following language to be a warranty:

> "We hereby guaranty that the boiler in regular practice, properly managed, shall evaporate ten pounds of water from one pound of good coal at 212 Fahrenheit, which we guaranty to be a saving of at least twenty per cent in fuel over any horizontal tubular boiler."

The court held the last clause, "Which we guaranty to be a saving of at least twenty percent in fuel over any horizontal tubular boiler" was a definite warranty, was legally binding and was not a mere expression of opinion or "puffing" on the part of the vendor. The language of "guaranty" therein construed, provided no stronger inducement for purchase than defendant's choice of language here, as both were designed to effect their end, namely, sales. This case clearly indicates the North Dakota Court's attitude toward holding expressions of guaranty as warranties.

Double your money back if you don't agree

CARA NOME NATURAL CURL

is the best HOME PERMANENT

GUARANTEE

If you don't agree that Cara Nome Natural Curl is better than any other Home Permanent, simply mail the unused portion and container together with a signed letter stating why you found this product unsatisfactory, to Rexall Drug Company, Dept. F, 8480 Beverly Blvd., Los Angeles 54, Calif., and we'll give you twice the original purchase price in return.

Double your money back if you don't agree

REXALL ANAPAC

is the best COLD REMEDY

GUARANTEE

If you don't agree that Rexall Anapac is better than any other Cold Remedy, simply mail the unused portion and container together with a signed letter stating why you found this product unsatisfactory, to Rexall Drug Company, Dept. F, 8480 Beverly Blvd., Los Angeles 54, Calif., and we'll give you twice the original purchase price in return.

II.

DID THE PLAINTIFF OR HER MOTHER RELY ON SAID WARRANTY?

Under cross-examination by counsel for the defendant, Rexall Company, Mrs. John Nihill testified that she picked up Exhibit 7 in the Kensal Rexall Drug Store, and that she relied upon Cara Nome products as being safe and good products, and that she had seen them advertised in various periodicals before that time (R. 431). Mrs. Nihill testified that she saved both guarantees, Exhibits 7 and 28 (R. 434-436). Further, under cross-examination by the attorney for the defendant, Rexall Company, Mrs. Nihill testified that she read the ads in the "Farm Journal"; that they said, in effect, "Rexall Drugs stands behind all its products", and that she relied upon that warranty (R. 443).

Lastly, on the instruction sheet itself contained within the permanent wave kit, is the flat statement, "safer". This is not only a warranty of safeness, but is in the comparative form implying that it is safer than any other product.

III.

IS THERE NECESSITY FOR PRIVITY IN BREACH OF AN EXPRESS WARRANTY BETWEEN MANUFACTURER OR DISTRIBUTOR AND THE CONSUMER IN COSMETICS CONTAINING CHEMICALS APPLIED TO THE HUMAN BODY?

Lack of privity of contract does not bar an action for breach of an express warranty made to induce

purchase or other forms of reliance upon it. Advertisements, in any event, are taken into consideration in deciding the existence of a warranty. *King v. Ohio Valley Termanix Co.,* (Ky. 1948) 214 S.W. 2d 993; *Turner v. Central Airway Company,* (Mo. 1945) 186 S.W. 2d 603.

Probably the leading case is *Baxter v. Ford Motor Company* (Wash. 1932) 35 P. 2d 1090. In that case the manufacturer was held strictly liable for inaccurate advertising, reliance upon which ultimately led to the purchaser's injuries.

A most recent case is a very similar cosmetics case, *Rogers v. Toni Home Permanent Company* (Ohio, 1958) 147 N.E. 2d 612. The court said:

> "Today many manufacturers of merchandise, including the defendant herein, make extensive use of newspapers, periodicals, signboards, radio and television to advertise their products. The worth, quality and benefits of these products are described in glowing terms and in considerable detail, and the appeal is almost universally directed to the ultimate consumer. Many of these manufactured articles are shipped out in sealed containers by the manufacturer, and the retailers who dispense them to the ultimate consumers are but conduits or outlets through which the manufacturer distributes his goods. The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their

described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss. In our minds no good or valid reason exists for denying him that right. Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious."

The only dissent in that case is as to whether or not this same principle should be applied to breach of implied warranties. The principle has now become settled that the manufacturer is liable to the ultimate consumer for breach of express warranty, said warranty being given either through the use of public advertising or the issuance of guarantees.

In *Free v. Sluss* (Cal. 1948) 197 P. 2d 854, 856, the plaintiff retailer had bought from a wholesaler soap sealed by defendant manufacturer with a printed guarantee of quality and of refund of purchase price by the dealer in the event of dissatisfaction. The manufacturer was held liable for plaintiff's financial loss on unmerchantability. The court said:

"As to the manufacturer, we have concluded that the guarantee of quality printed on each package of soap reached beyond the dealers to persons in

> the positions of plaintiffs. It establishes the manufacturer's knowledge and intention that the goods should move through the usual channels of trade and was a representation addressed to those who deal in its product. It was under no obligation to make the guarantee, but having made it, it does not lie in its mouth to repudiate it when the condition of complete unsuitability for the market brings the guarantee into play."

It is to be particularly noted that all jurisdictions, without the necessity of citations, are uniform in holding no necessity for privity of contract between manufacturers and consumers or distributors and consumers, on either express or implied warranties in food and drug cases, as is so ably pointed out in *Rogers v. Toni Home Permanent Company,* supra. Is there any logical or just reason for any distinction between those products which are consumed within the human body causing harm, and those products which are applied to the outside of the human body and cause harm?

CONCLUSION.

It is respectfully submitted that the verdict should be in all things sustained against the manufacturer defendant, Arnold L. Lewis, doing business as Studio Cosmetics Company, upon the grounds and for the reasons that there was adequate showing of negligence in the product sold and purchased, and that further, the case was properly submitted to the jury upon the doctrine of res ipsa loquitur; that the verdict of the

jury should be sustained against the defendant, Rexall Drug Company, upon the grounds and for the reason that their advertising and written guarantees constitute an express warranty which was relied upon by the minor plaintiff and her mother.

Dated, Fargo, North Dakota,
July 27, 1959.

Respectfully submitted,
LANIER, LANIER & KNOX,
By P. W. LANIER, JR.
A member of the firm
Attorneys for Appellee,
Sandra Mae Nihill